


M E M O R A N D U M

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SUBJ: Comments on Proposed Rulemaking
45 CFR Part 1604, Outside Practice of Law

This memorandum provides the OIG's comments on proposed revisions to 45 CFR Part 1604, published in the Federal Register for comment on September 10, 2002.

Section 1604.1 Purpose

The purpose section should state that the Part is designed to ensure that full-time attorneys do not engage in the compensated outside practice of law and only engage in the uncompensated outside practice of law as authorized by the rule. This is LSC's statutory mandate, see LSC Act, § 1007(a)(4).

Because of the above-referenced mandate, LSC is responsible for promulgating the guidelines and cannot delegate to recipients the authority to adopt policies governing the outside practice of law. As written, the purpose section suggests such a delegation and therefore should be modified. We realize that the rule itself includes some guidelines, but make the suggestion because of the impression the purpose section leaves. The last sentence should be deleted entirely as it suggests a policy in favor or outside practice, which is inconsistent with the policy of the LSC Act.

Section 1604.2 Definitions

(a) Full-time attorney – We have no comment on the definition itself, but recommend that the preamble make clear that full-time for purposes of 1604 should be defined in the same manner that the recipient defines full-time for other purposes, e.g., receipt of employee benefits.

(c) Court appointment – We recommend changing “under a statute or court rule or practice” to “statute, rule or practice applied generally to attorneys practicing in the court or before the administrative agency where the appointment is made.” This more closely follows the statutory language and makes clear that the statute, rule or practice must apply generally. This was the purpose of amending the LSC Act in 1977 to include this provision. It also makes clear that the rule or practice language applies in agencies, not just courts.

Section 1604.3 General Policy

(a) The OIG recommends that the general policy in subsection (a) be redrafted to state the prohibitions and restrictions on outside practice as it is the current rule and in the LSC Act. Changing the rule to state the policy in the affirmative gives the impression that LSC is encouraging outside practice and/or that the prohibitions and restrictions on outside practice should be interpreted more narrowly than is intended by the law. The legislative history to the outside practice restriction makes clear that outside practice is to be permitted in only very limited circumstances:

Sec. 7 provides that with respect to grants and contracts to provide legal assistance to eligible clients the corporation in accordance with the Canons of Ethics and Code of Professional Responsibility shall:

* * *

(4) insure that full-time attorneys represent only eligible clients and refrain from the outside practice of law. Attorneys employed full-time in legal services activities paid for by the corporation will be prohibited from engaging in any outside practice of law for compensation. It is expected that such attorneys, however, will be permitted to handle uncompensated legal work for their families, church groups, community organizations, and other parties so long as their uncompensated work does not interfere with their responsibilities to provide first-rate legal assistance to the poor in accordance with this bill.

H. Rep. No. 247, 93rd Cong., 2d Sess., 1974.

(c) The OIG recommends that LSC include in Part 1604 guidelines on the outside practice of law by part-time attorneys. Having all outside practice addressed in one rule makes sense. In addition, since the FY 1996 appropriations act restrictions, more and more grantee attorneys have become part-time attorneys in order that they may continue to provide legal assistance in restricted cases, either on their own time or as part-time employees for another organization. Because of this increased incidence of part-time employment and the implications on the program integrity requirements of 45 CFR Part 1610, the OIG recommends that LSC include in Part 1604 guidelines for part-time employees.

1604.4 Permissible Outside Practice

The OIG recommends that subsection (5) apply only to mandatory pro bono. An attorney is not obligated to provide pro bono services if it is not mandatory. Voluntary pro bono should be treated as is any other outside practice under the rule. The preamble, which interprets "obligation" to include rules that make pro bono mandatory or aspirational, therefore, should be modified to make this clear. In addition, the OIG recommends deleting the phrase "and practices" from this subsection because it is too vague and pro bono is either required by a rule or it is not.

1604.5 Compensation

The OIG recommends deletion of subsections (b) and (c). The LSC Act prohibits any compensated outside practice of law. The very limited exception for attorneys transitioning from a previous law practice has always been viewed as justifiable because it is consistent with, and arguably required by, the rules/code of professional responsibility. Compensated outside practice cannot legitimately be redefined as uncompensated outside practice in the manner proposed by the proposed rule. No matter what the attorney receiving the compensation later does with the fee award, outside practice for which an attorneys' fee is awarded is compensated outside practice, *Jordan v. City of Greenwood, Miss.*, 808 mF2d 1114 (5th Cir. 1987), *cert. denied*, 484 US 824 (1987) ("We conclude, therefore, that regulation 1604.5 does not encompass any fee-generating work, even if the fee is contingent on successfully prosecuting a case. Outside practice is "compensated" within the meaning of the Act and regulations if it reasonably may be expected to result in a fee for legal services."). In addition, allowing the claiming and collection of an attorneys' fee award and/or requiring that the fee award be remitted to the recipient violates section 504(a)(13) of the

1996 appropriations act, which prohibits recipients and their employees from claiming, collecting and retaining attorneys' fees.

1604.6 Use of recipient resources

The OIG recommends deletion of subsection (b) in its entirety, and modification of subsection (a) by deletion of the introductory phrase "For cases undertaken pursuant to § 1604.4(c)(1)."

Recipient resources may not be used to support restricted activities. This section, which allows the use of recipient resources to support outside practice involving representation in restricted matters or of otherwise ineligible clients, is inconsistent with section 504 of the FY 1996 appropriations act and the LSC Act, and permits recipients to violate the law. For outside practice involving restricted cases or other activity, the allowable activity using recipient resources should be no broader than that allowed for part-time attorneys under 45 CFR Part 1635, LSC's timekeeping regulation. That regulation allows part-time attorneys to engage in very minimal action related to restricted activities. "Actions consistent with the *de minimis* standard are those that meet all or most of the following criteria: actions that are of little substance; require little time; are not initiated by the part-time employee; and, for the most part, are unavoidable." 45 CFR § 1635.3(d). The preamble to Part 1635 makes clear that the *de minimus* standard is to be interpreted very narrowly:

Activities that would meet the standard include answering the telephone and establishing another non-LSC program time with the caller to discuss the restricted activity, or opening and briefly screening mail. Actions that would not meet this standard include researching, preparing legal documents, meeting with or providing advice to the client and conferring with third parties on behalf of the client. Although the examples listed above are not intended to provide an exhaustive list of permissible and impermissible actions, LSC cautions recipients that it intends to interpret the *de minimis* standard strictly to permit only a very narrow range of actions. LSC is taking this position in order to ensure that part-time attorneys and paralegals are not engaged in restricted activities while being compensated by the recipient or using recipient resources for restricted activities.

See also LSC Program Letter 2000-5. Allowing anything beyond such *de minimus* actions on restricted activities would be an improper subsidy under 45 CFR Section 1610.8(a)(2). As stated in the preamble to Part 1610, "A recipient will be considered to be subsidizing the restricted activities of

another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use.”

Finally, even if the outside practice does not involve restricted activities, allowing the use of recipient resources, time and/or property, vitiates the prohibition/restrictions on outside practice. Outside practice would be indistinguishable from “inside” practice, except that the recipient supported activity would not necessarily be “for the purpose of “furnishing legal assistance to eligible clients.” 42 USC § 2996e(a)(1)(A). As such, the costs associated with the activity normally would be subject to disallowance under 45 CFR § 1630.3. See Program Letter 2000-5, n. 1.

In conclusion, the OIG recommends that (1) any outside practice involving restricted activities be subject to the same constraints as outside part-time employment under 45 CFR Part 1635, and (2) any outside practice involving permissible activities be subject to reasonable constraints as would any other personal activity by an employee of the recipient, i.e., activities may not interfere with the employee’s official duties, activities are engaged in at employee’s own expense or cause no additional expense to the recipient and on his/her own time, e.g., before or after work, during lunch hour or while on leave.

1604.7 Court appointments

(a) The OIG recommends changing subsection (a)(1) to “Such an appointment is consistent with the recipient’s primary responsibility to provide legal assistance to eligible clients in civil matters.” See 45 CFR Part 1613.4(a) (relating to appointments in criminal proceedings).

(d) The OIG recommends making clear in subsection (d) that attorneys may not receive compensation for mandatory pro bono activities. In addition, the OIG recommends adding the requirement under subsection (d) that allowable mandatory pro bono activities under 1604.7 must be in cases or matters permissible under the LSC grant for the same reasons stated under 1604.6, above.